MOTION FILED
APR 22 1985

No. 84-1506

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

---

AIRWORK SERVICE DIVISION,
*Petitioner,*

v.

DIRECTOR, DIVISION OF TAXATION,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

---

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

---

ROBIN S. CONRAD
*Counsel of Record*
PAULA J. CONNELLY
LYNN M. SMELKINSON
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*Counsel for the* Amicus Curiae
*Chamber of Commerce of the United States*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

No. 84-1506

---

AIRWORK SERVICE DIVISION,
*Petitioner,*

v.

DIRECTOR, DIVISION OF TAXATION,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

---

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

---

The Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae* in this case pursuant to Supreme Court Rule 36.1. This brief is filed in support and with the written consent of Petitioner Airwork Service Division ("Airwork").[1] The consent of Respondent Division of Taxation ("Tax Division") was requested but refused, thus making this motion necessary.

The Chamber is the largest federation of business organizations and individuals in the United States. The

---

[1] A copy of the consent letter is being filed with the attached brief.

Chamber's current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and local and state chambers of commerce. The Chamber regularly advocates its members' views in court and before administrative agencies on issues of national concern to the American business community. The Chamber's interest in tax issues is well-established.[2]

This case involves the retroactive assessment of state sales taxes against companies that render services to out-of-state customers.[3] At issue is a constitutional question of vital concern to the business community, that is, whether the retroactive imposition of sales taxes based on a revised interpretation of law, adopted without notice and in violation of the state's Administrative Procedure Act, violates the constitutional guarantee of due process of law.

The Chamber opposes the concept of retroactive law enforcement, and has participated in several cases advocating the reversal of government actions with retro-

---

[2] The Chamber has submitted comments to administrative agencies on tax matters, and has participated as an *amicus* in several cases before this Court on tax issues. *See, e.g.*, Comments of the Chamber of Commerce of the United States on *Proposed Regulations Relating to the Limitation on the Amount of Depreciation and Investment Tax Credit for Automobiles and the Limitation when Certain Property is Used for Personal Purposes* (December 12, 1984); *United States* v. *Arthur Young Co.*, 104 S.Ct. 1495 (1984) (confidentiality of tax analysis work papers); *El Paso Co.* v. *United States, cert. denied*, 52 U.S.L.W. 3756 (U.S. April 16, 1984) (same issue as *Arthur Young*); *Thor Power Tool Co.* v. *IRS*, 439 U.S. 522 (1979) (whether the IRS should accept for tax purposes certain inventory and accounting methods).

[3] That the impact of this problem extends beyond the Petitioner is evidenced by the Petition for Writ of Certiorari to the New Jersey Supreme Court filed in *S.G. Frantz Co.* v. *Director, Division of Taxation*, No. 84-1504 (U.S. Mar. 22, 1985), currently pending before this Court.

active effect.[4] The Chamber believes that, in order to comply with regulatory programs, businesses need to know on a timely basis what conduct is permitted and what is proscribed by the regulations applicable to their operations. This is particularly important with the collection of sales taxes, because sellers have only one opportunity to collect sales taxes, that is, at the time of sale. Once the sale is complete, it is often too late to collect the tax, especially when services are provided to out-of-state customers. Accordingly, businesses must know in advance whether they are expected to collect sales taxes for such services, rather than learning about policy changes through retroactive assessments by the state taxing authority.

In keeping with traditional notions of fundamental fairness, government agencies have an obligation to notify businesses of what the law is *before* it is enforced against them. The New Jersey Tax Division failed to meet this obligation when it reversed its policy on sales tax collection without notice, and retroactively assessed uncollected sales taxes against a company that relied on a prior published policy statement. This retroactive assessment is offensive to constitutional principles of due process.

In many jurisdictions, sellers are charged with the responsibility of collecting sales taxes from their customers for the government. In their efforts to comply with these requirements, businesses must be able to rely on official published statements of policy issued by taxing authorities. The notion that surprise retroactive tax assessments

---

[4] *See, e.g., Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, —— U.S. ——, 104 S.Ct. 2709 (1984) (successful challenge of the retroactive application of the Multiemployer Pension Plan Amendments Act of 1980); *United States* v. *Exxon Corporation, appeal pending*, No. DC-93 (Temp. Emer. Ct. App. 1983) (challenging the retroactive application of Department of Energy rules regarding price controls).

may be made based on the taxing authority's most current interpretation of the law violates the most fundamental concepts of due process. Moreover, such assessments shift the burden of the sales tax from the customer to the vendor, converting the business from tax collector to taxpayer.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber believes it is important for this Court to recognize the significance of these tax issues to business as a whole and, therefore, respectfully requests leave to file the attached brief.

Respectfully submitted,

ROBIN S. CONRAD
*Counsel of Record*

PAULA J. CONNELLY
LYNN M. SMELKINSON

NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*Counsel for the* Amicus Curiae
*Chamber of Commerce of the United States*

## TABLE OF CONTENTS


| | Page |
|---|---|
| STATEMENT OF INTEREST | 1 |
| INTRODUCTION | 1 |
| ARGUMENT | 3 |
| I. THIS RETROACTIVE ASSESSMENT OF UNCOLLECTED SALES TAXES VIOLATES AIRWORK'S FOURTEENTH AMENDMENT RIGHTS | 3 |
| II. THE DECISION OF THE NEW JERSEY SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT, SEVERAL FEDERAL CIRCUIT COURTS, AND NUMEROUS HIGHEST STATE COURTS | 7 |
| CONCLUSION | 11 |

## TABLE OF AUTHORITIES

CASES — Page

*Amtronix Industries, Ltd.* v. *State of Wisconsin, Labor and Industry Review Commission*, 115 Wis.2d 108, 339 N.W.2d 802 (Wis. Ct. App. 1983) ..... 9
*Appeal of Denman*, 120 N.H. 568, 419 A.2d 1084 (N.H. 1080) ..... 10
*Blocker Drilling Canada, Ltd.* v. *Conrad*, 354 N.W.2d 912 (N.D. 1984) ..... 10
*Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970) ..... 8
*Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886 (1961) ..... 5
*Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21 (1978) ..... 6, 7
*Coolidge* v. *Long*, 282 U.S. 582 (1931) ..... 5
*Department of Revenue* v. *Family Hospital, Inc.*, 105 Wis.2d 250, 313 N.W.2d 828 (Wis. 1982) ..... 9
*Dickman* v. *Commissioner*, —— U.S. ——, 104 S. Ct. 1086 (1984) ..... 2, 8
*Foote's Dixie Dandy, Inc.* v. *McHenry*, 270 Ark. 816, 607 S.W.2d 323 (1980) ..... 10
*George W. Davis & Sons, Inc.* v. *Askew*, 343 So.2d 1329 (Fla. App. 1977) ..... 11
*Grayned* v. *City of Rockford*, 408 U.S. 104 (1972) ..... 2
*Griswold* v. *Connecticut*, 381 U.S. 479 (1965) ..... 4
*Helvering* v. *Griffiths*, 318 U.S. 371 (1943) ..... 6
*Hoffman* v. *City of Syracuse*, 2 N.Y.2d 490, 161 N.Y.S.2d 111 (1957) ..... 9
*Illinois Bell Telephone Co.* v. *Allphin*, 95 Ill. App. 3d 115, 419 N.E.2d 1188 (Ill. App. 1981), *affirmed*, 443 N.E.2d 580 (Ill. 1982) ..... 11
*In re Fox*, 609 F.2d 178 (5th Cir. 1980) ..... 4
*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951) ..... 5
*Lansons, Inc.* v. *Commissioner of Internal Revenue*, 622 F.2d 774 (5th Cir. 1980) ..... 8
*Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981) ..... 5

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Market Street Ry. Co.* v. *California State Board of Equalization*, 190 P.2d 20 (Cal. Ct. App. 1955) | 11 |
| *Mesaba Aviation Division* v. *County of Itasca*, 258 N.W.2d 877 (Minn. 1977) | 10 |
| *Metromedia, Inc.* v. *Director, Division of Taxation*, 97 N.J. 313, 478 A.2d 742 (N.J. 1984) | 4 |
| *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) | 5 |
| *Nichols* v. *Coolidge*, 274 U.S. 531 (1926) | 5 |
| *Ormet Corp.* v. *Lindley*, 69 Ohio St. 2d 263, 431 N.E.2d 686 (1982) | 11 |
| *Parrat* v. *Taylor*, 451 U.S. 527 (1980) | 4 |
| *Pennwalt Corp.* v. *Metropolitan Sanitary District*, 382 F. Supp. 972 (N.D. Ill. 1973) | 4 |
| *Rock Island, A. & L. R. Co.* v. *United States*, 254 U.S. 141 (1920) | 10 |
| *Rosenow* v. *State of Illinois, Department of Revenue*, 715 F.2d 277 (7th Cir. 1983) | 4 |
| *Ross Jewelers, Inc.* v. *State*, 260 Ala. 682, 72 So.2d 402 (1953) | 4 |
| *S.G. Frantz Co.* v. *Director, Division of Taxation, pet. for cert. filed*, No. 84-1504 (U.S. Mar. 22, 1985) | 3 |
| *United States* v. *Caceres*, 440 U.S. 741 (1979) | 6 |
| *United States* v. *Darusmont*, 449 U.S. 292 (1981) | 5 |
| *Untermyer* v. *Anderson*, 276 U.S. 440 (1927) | 5 |
| *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959) | 6 |
| *Welch* v. *Henry*, 305 U.S. 134 (1938) | 5 |
| *Wendland* v. *Commissioner of Internal Revenue*, 739 F.2d 580 (9th Cir. 1984) | 8 |
| *Wisconsin Department of Revenue* v. *Moebius Printing Co.*, 89 Wis.2d 610, 279 N.W.2d 213 (1979) | 9 |
| *Woodward* v. *United States*, 445 F.2d 1204 (1971), *affirming* 322 F. Supp. 332 (W.D. Va. 1971) | 8 |

## TABLE OF AUTHORITIES—Continued


STATUTES — Page

New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.* ..... 4

OTHER MATERIALS

Assembly Taxation Committee Statement, No. 1787, L. 1977 c. 54 ..... 7

Comment, *Developments in the Law, The Constitution and the Family,* 93 Harv. L. Rev. 1156 (1980) ..... 4

Mcquire and Limet, *Hobson's Choice and Similar Practices in Federal Taxation,* 48 Harv. L. Rev. 1281 (1935) ..... 10

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

No. 84-1506

---

AIRWORK SERVICE DIVISION,
*Petitioner,*

v.

DIRECTOR, DIVISION OF TAXATION,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Supreme Court of New Jersey**

---

## BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

---

### STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief *Amicus Curiae* for a statement of its interest in this proceeding.

### INTRODUCTION

American businesses are subject to a number of federal and state regulatory programs. In order to function efficiently and in compliance with applicable regu-

lations, they must be able to readily ascertain the meaning of those regulations. Without clarity, companies cannot determine whether their business decisions are lawful or unlawful. While it is unquestionably the duty of American businesses to comply with the law, it is the duty of the government to make clear what the law is, in advance, so that companies can comply with it. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). Clear regulations are especially important when they involve the collection of sales taxes, a one-time activity occurring only at the time of sale. The New Jersey Division of Taxation ("Tax Division"), as detailed below,[1] failed to make its requirements clear, and now seeks to make Petitioner Airwork Service Division ("Airwork") bear the burden of its failure.

In 1966, the Tax Division issued an "Official News Release" which provided that charges for repairs to articles delivered out of state were exempt from the state sales tax.[2] No vendor, viewing this statement, could reasonably have suspected that a taxing obligation existed for such services.[3] In 1973, the Tax Division published a statement reversing its prior position, ruling that the services were subject to the tax. From 1966 to 1973, the Division gave no notice of any kind of its change in policy. The 1966 release was neither with-

---

[1] A brief restatement of the facts is necessary to adequately present the fairness issue to this Court.

[2] The Tax Division was under no obligation to "assert a particular position as soon as the statute authorize[d] such an interpretation." *Dickman* v. *Commissioner*, —— U.S. ——, 104 S. Ct. 1086, 1094 (1984). But the Division did assert an official position in 1966, and issued a news release to publicize it.

[3] The Division's "Official News Release" stated:

> Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax.

drawn nor corrected. Moreover, the Tax Division audited Airwork during that period and did not assess the company for any tax deficiency.

In 1973, the Tax Division assessed Airwork for more than $600,000 in uncollected sales taxes, contending that the company should have known of its change in policy. This assessment had the effect of requiring the company to pay out of its own pocket taxes which it would have collected from its customers, had it *not* followed the Tax Division's own written directive on the issue. The fundamental unfairness of this result is striking, and the intervention of this Court is needed to protect the company's constitutional right to due process of law.[4]

## ARGUMENT

### I. THIS RETROACTIVE ASSESSMENT OF UNCOLLECTED SALES TAXES VIOLATES AIRWORK'S FOURTEENTH AMENDMENT RIGHTS.

The Due Process Clause of the Fourteenth Amendment prohibits the states from depriving any person of life, liberty or property without due process of law. New Jersey's retroactive assessment against Airwork of sales taxes the company did not collect in reliance on the Tax Division's "Official News Release" is repugnant to this constitutional guarantee.

Pursuant to the doctrine of substantive due process, "governmental deprivations of life, liberty or property

---

[4] Also at issue is the constitutionality of imposing sales taxes on nonresident purchasers of services performed in state and delivered out-of-state under the Commerce Clause, the Equal Protection Clause, and the Due Process Clause. The Chamber believes that these significant issues are thoroughly addressed in the Petition for Writ of Certiorari to the New Jersey Supreme Court filed in *S.G. Frantz Co.* v. *Director, Division of Taxation*, No. 84-1504 (U.S. Mar. 22, 1985), currently pending before this Court. Rather than burdening the Court with a restatement of these arguments, the Chamber respectfully directs the Court's attention to that Petition.

are subject to limitations regardless of the adequacy of the procedures employed." [5] New Jersey's retroactive application of its change in tax policy, adopted without complying with state administrative procedures,[6] so egregiously offends Airwork's due process rights that it compels this Court's review.

In normal circumstances, sales tax liability falls on the purchaser, not the seller.[7] The seller merely collects the tax under the authority and for the benefit of the state, adding it to the price of the goods or services offered.[8] In this case, however, New Jersey has turned tax policy inside out, converting the seller from a tax collector to a taxpayer.

---

[5] Comment, *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1166 (1980). *See also, Parrat* v. *Taylor*, 451 U.S. 527, 545 (1980) (Blackmun, J., concurring); *Griswold* v. *Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring).

[6] The New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*, mandates the completion of certain notice and comment procedures before a valid administrative rule can be adopted. Absent compliance with these requirements, the Tax Division's change of official policy was invalid, despite reliance on broad statutory authority. *See, Metromedia, Inc.* v. *Director, Division of Taxation*, 97 N.J. 313, 478 A.2d 742, 752 (N.J. 1984) and Airwork's Petition at 8.

[7] Collection of these taxes by the seller is similar to "trust fund taxes," a term of art used to describe, *inter alia*, employment withholding deductions. *See Rosenow* v. *State of Illinois, Dept. of Revenue*, 715 F.2d 277, 279 (7th Cir. 1983).

[8] *See Rosenow* v. *State of Illinois, Dept. of Revenue*, 715 F.2d at 281 and n.6 (the sales tax obligation remains primarily that of the purchaser, who remains liable for the tax if the seller fails to collect it); *Pennwalt Corp.* v. *Metropolitan Sanitary District*, 382 F. Supp. 972, 978 (N.D. Ill. 1973); *Ross Jewelers, Inc.* v. *State*, 260 Ala. 682, 72 So.2d 402 (1953) (the ultimate burden of sales taxes is on consumers, not sellers). *See also, In re Fox*, 609 F.2d 178, 181 (5th Cir. 1980).

This Court has noted repeatedly that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961), *quoting Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Rather, "fundamental fairness" must be accorded in light of all the circumstances. *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24-25 (1981).[9] This direct assessment against a taxpayer who followed the taxing authority's published directive in an earnest effort to fulfill its role as sales tax collector offends all notions of fundamental fairness.

This Court has invalidated retroactive taxes when their application is "so harsh and oppressive as to transgress the constitutional due process limitation." *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). This analysis may take into account whether the taxpayer could have altered its behavior to avoid liability if the tax could have been anticipated at the time of the transaction, and whether the taxpayer had notice of the tax. *United States* v. *Darusmont*, 449 U.S. 292 (1981).

Thus, this Court has held retroactive application of a tax so arbitrary and oppressive as to be a denial of due process in cases in which the taxpayer might well have refrained from a particular course of action, had it anticipated the tax.[10] And the Court has invalidated

---

[9] *See also, Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (fundamental fairness is what due process means); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. at 162 (Frankfurter, J., concurring) (due process "[r]epresent[s] a profound attitude of fairness between . . . the individual and government").

[10] *See, Coolidge* v. *Long*, 282 U.S. 582 (1931); *Untermyer* v. *Anderson*, 276 U.S. 440, 445 (1927); *Nichols* v. *Coolidge*, 274 U.S. 531, 542 (1926).

retroactive tax determinations as unfair in circumstances where the taxpayer could not reasonably have known of its liability. In *Central Illinois Public Service Co.* v. *United States*, 435 U.S. 21, 32 (1978), the Court invalidated the retroactive application of a rule requiring employers to withhold certain taxes from employees' wages. The Court stated: "In 1963 not one regulation or ruling required witholding . . . . No employer, in viewing the regulations, could reasonably suspect that a withholding obligation existed." [11]

Fairness requires administrative agencies to abide by their own rules until they are lawfully changed. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). This is especially true when an individual or company "reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency." *United States* v. *Caceres*, 440 U.S. 741, 752-53 (1979).

Had Airwork known of the Division's change in tax policy, it would have passed this liability to its customers during the years in question. In fact, as soon as the company learned, through the Division's 1973 publication announcing the change, that services to its nonresident customers were indeed taxable, it immediately began to collect sales taxes from those customers.

The New Jersey assessment violates basic notions of fundamental fairness and due process. Its imposition converts Airwork from a state-mandated sales tax collector to a taxpayer, shifting the burden of tax liability from the purchaser to the seller without due process, indeed without any process at all. This result is unconstitutional and must not be allowed to stand.

---

[11] *See also, Helvering* v. *Griffiths*, 318 U.S. 371 (1943).

## II. THE DECISION OF THE NEW JERSEY SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT, SEVERAL FEDERAL CIRCUIT COURTS, AND NUMEROUS HIGHEST STATE COURTS.

The New Jersey Supreme Court's decision to uphold the retroactive assessment against Airwork conflicts with a decision of this Court, and with numerous circuit and state court decisions. This conflict alone meets one of the traditional standards for exercise of this Court's jurisdiction and has far-reaching implications for all taxpayers.

In *Central Illinois*, this Court struck down a retroactive assessment of taxes in circumstances analogous to this case. 435 U.S. 21. The decision below directly conflicts with this Court's decision. Accordingly, this Court should grant the petition for review.

In invalidating the retroactive assessment against Central Illinois, this Court found that "imposition of taxes retroactively . . . would not serve the important function of ensuring that all similarly situated taxpayers are assessed equally. Instead, the likely effect would be that . . . petitioner will bear the tax directly rather than simply acting as a collection conduit . . . ." 435 U.S. at 38 (Brennan, J., concurring). The same result obtains in this case. Converted from tax collector to taxpayer, Airwork is required to pay uncollected sales taxes out of its own pocket. The unfairness of this result was recognized by New Jersey's own legislature when it enacted a formal sales tax exemption for repairs provided to out-of-state purchasers. The Committee stated: "Such taxes, when assessed against New Jersey businesses, in many cases incur a loss because they are unable to collect from customers after the fact." Assembly Taxation Committee Statement, No. 1787, L. 1977 c. 54.

Several federal circuit courts also have invalidated retroactive agency determinations on the basis of fair-

ness. Others have noted the sufficiency of process accorded in upholding such determinations. Of particular note are *Lansons, Inc.* v. *Commissioner of Internal Revenue*, 622 F.2d 774 (5th Cir. 1980) and *Briscoe* v. *Kusper*, 435 F.2d 1046 (7th Cir. 1970).

In *Lansons*, the Fifth Circuit refused to permit the IRS to retroactively revoke its determination that the taxpayer's trust plan was a qualified trust. The court noted that the taxpayer had substantially relied in good faith on the Commissioner's determination, and held that retroactive revocation would produce an "inordinate adverse effect." 622 F.2d at 778. The Fourth Circuit approved the same analysis in *Woodward* v. *United States*, 445 F.2d 1204 (1971), *affirming* 322 F. Supp. 332 (W.D. Va. 1971).[11]

In *Briscoe*, the Seventh Circuit emphasized that an agency "may not deviate from . . . prior rules of decision on the applicability of a fundamental directive without announcing in advance its change in policy." 435 F.2d at 1055. Moreover, the court stated, "[u]ntil such time as [the agency] makes public its new determination, it is constitutionally prohibited from imposing that rule on unsuspecting persons." *Id.*

Numerous highest state courts also have invalidated retroactive tax liability on the grounds of due process and fundamental fairness. Many of these cases resemble the case at bar both because of the taxpayers' reliance on prior government actions and their current inability to collect the tax.

---

[12] *See also, Wendland* v. *Commissioner of Internal Revenue*, 739 F.2d 580 (9th Cir. 1984) (court noted that the taxpayers had notice of an impending tax policy through a news release and publication of proposed and final versions in the Federal Register, and thus upheld retroactive application). And just this term, this Court noted, in upholding retroactive application of a tax policy, that the taxpayer had notice of it in advance of the contested actions. *Dickman* v. *Commissioner*, 104 S. Ct. at 1094 n.13 (1984).

The Court of Appeals of New York refused to allow a retroactive sales tax assessment in *Hoffman* v. *City of Syracuse*, 2 N.Y.2d 490, 161 N.Y.S.2d 111, 116 (1957), declaring:

> [I]t hardly needs statement that the city is not entitled to hold the liquor dealers liable for the higher sales tax which they could have charged and collected, had the commissioner not directed a contrary course of action during that period . . . . [I]t would be unthinkable to hold [the sellers] responsible for the larger amounts they would have collected . . . .

The Supreme Court of Wisconsin has struck down several retroactive sales tax assessments. In *Wisconsin Department of Revenue* v. *Moebius Printing Co.*, 89 Wis.2d 610, 279 N.W.2d 213, 225 (1979), noting that it was unclear whether the taxpayer could collect the tax retroactively from its customers, the court held that governmental conduct which works a "serious injustice" cannot be permitted. In that case, the taxpayer had not collected the tax in reliance on the post-audit letter of a state auditor, which indicated that the company was doing an "excellent all around job" in complying with the state sales tax law. The court also found it significant that shortly after the tax period at issue, the legislature enacted a sales tax exemption covering precisely the type of sale the state was attempting to tax. As noted above, the New Jersey legislature enacted an exemption from the sales tax at issue here in 1977.

In *Department of Revenue* v. *Family Hospital, Inc.*, 105 Wis.2d 250, 313 N.W.2d 828, 832 (Wis. 1982), the Wisconsin Supreme Court invalidated a retroactive sales tax assessment on a hospital's parking receipts, after the hospital relied on a "technical information memorandum" stating that such receipts were non-taxable. Once again, the court emphasized its "interest in guaranteeing that taxpayers receive fair play from our state's tax enforcement officials." *See also, Amtronix Industries, Ltd.* v.

*State of Wisconsin, Labor and Industry Review Comm'n*, 115 Wis.2d 108, 339 N.W.2d 802, 806 (Wis. Ct. App. 1983) (court invalidated retroactive assessment of unemployment taxes, noting that company was "trapped," because it could not now change the employment relationship it held in prior years with its subcontractors).

The Supreme Court of Arkansas refused to allow a retroactive assessment of unemployment insurance contributions in *Foote's Dixie Dandy, Inc.* v. *McHenry*, 270 Ark. 816, 607 S.W.2d 323, 327 (1980), again on the basis of fairness. In discussing this issue, the court quoted this Court's statement in *Rock Island, A. & L. R. Co.* v. *United States*, 254 U.S. 141, 143 (1920) that "[m]en must turn square corners when they deal with the government," and its "logical corollary" that "the government [should be] held to a like standard of rectangular rectitude when dealing with its citizens." 607 S.W.2d at 307, *quoting*, Mcquire and Limet, *Hobson's Choice and Similar Practices in Federal Taxation*, 48 Harv. L. Rev. 1281, 1299 (1935). *See also, Blocker Drilling Canada, Ltd.* v. *Conrad*, 354 N.W.2d 912, 922 (N.D. 1984) (Supreme Court of North Dakota invalidated reassessment on the grounds of "manifest injustice to the taxpayers").

Similarly, courts in New Hampshire, Minnesota, Ohio, Florida, California and Illinois have refused to allow retroactive assessments of taxes. Generally, these cases involve companies, like Airwork, that had insufficient notice of the tax or reasonably relied on official statements exempting them from liability. *See, e.g., Appeal of Denman*, 120 N.H. 568, 419 A.2d 1084, 1088 (N.H. 1980) ("a reasonable reading of the regulations" would not have indicated that sales taxes should be collected); *Mesaba Aviation Division* v. *County of Itasca*, 258 N.W.2d 877, 880-81 (Minn. 1977) (if a specific representation is authoritatively made and invites reliance, and taxpayer's change of position makes it inequitable to retract the representation, the government may be prevented from

imposing retroactive assessment); *Ormet Corp.* v. *Lindley*, 69 Ohio St. 2d 263, 431 N.E.2d 686, 689 (1982) (court invalidated retroactive assessment of sales and use tax on company's machinery, noting long-established administrative practice of considering the plant exempt). Other state courts have applied similar analyses. *See George W. Davis & Sons, Inc.* v. *Askew*, 343 So.2d 1329, 1332 (Fla. App. 1977); *Market Street Ry. Co.* v. *California State Board of Equalization*, 290 P.2d 20, 30 (Cal. Ct. App. 1955); *Illinois Bell Telephone Co.* v. *Allphin*, 95 Ill. App. 3d 115, 419 N.E.2d 1188, 1196-97 (Ill. App. 1981), *affirmed*, 443 N.E.2d 580 (Ill. 1982).

The overwhelming weight of authority thus precludes a retroactive assessment such as the one imposed on Airwork. The decision of the New Jersey Supreme Court conflicts with the holdings of courts on every level, including this Court. Accordingly, it is imperative that this Court review the decision and eliminate this conflict.

## CONCLUSION

In order to protect Airwork's constitutional rights and resolve the conflict among the lower courts, the Chamber respectfully urges this Court to grant the Petition For a Writ of Certiorari.

Respectfully submitted,

ROBIN S. CONRAD
*Counsel of Record*

PAULA J. CONNELLY
LYNN M. SMELKINSON

NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*Counsel for the* Amicus Curiae
*Chamber of Commerce of the United States*

April 22, 1985